



The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion

Citation

Tomiko Brown-Nagin, The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion, 7 U. Pa. J. Const. L. 787 (2014).

Published Version

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**THE TRANSFORMATIVE RACIAL POLITICS OF
JUSTICE THOMAS?:
THE GRUTTER V. BOLLINGER OPINION**

*Tomiko Brown-Nagin**

INTRODUCTION

Justice Clarence Thomas is a flashpoint for liberals and moderates' concern about the ascendancy of conservative thought in law and politics. Both have denounced Justice Thomas's judicial philosophy and decisions in scathing terms since his appointment to the Supreme Court in 1991. Justice Thomas has been called a stooge of the political right and a hypocrite.¹ African American leaders have skewered Justice Thomas in particularly personal terms, describing him as "look[ing] black, but think[ing] white"² and as "the Whitest man in America" in terms of his "political program" and "repudiation of civil rights."³ Thomas's jurisprudence in race-related cases is a special target of contempt. Proponents of affirmative action are caustic in their criticisms of Justice Thomas, in light of his opposition to race-conscious policies.⁴ That he apparently was a beneficiary of affirmative action, but now denies others the opportunities that he has enjoyed, animates claims that Justice Thomas's race jurisprudence

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¹ See KEN FOSKETT, JUDGING THOMAS 2, 231–32, 288–89, 297, 314 (2004) (enumerating a number of criticisms of Justice Thomas, ranging from his failure to help other black people after he "made it" to how he "obeys" Justice Scalia); ANDREW PEYTON THOMAS, CLARENCE THOMAS 350–52, 360 (2001) (describing the aggressive support of the political right and the vehement opposition of liberals and some moderates to Justice Thomas's nomination to the Supreme Court).

² THOMAS, *supra* note 1, at 351 (quoting Derrick Bell on the television program, *Nightline*).

³ FOSKETT, *supra* note 1, at 289 (quoting Derrick Bell and Manning Marable, respectively); see also *id.* at 4, 135, 231, 288–89 (likening Justice Thomas to a Judas, Benedict Arnold, and Brutus to the black community).

⁴ See FOSKETT, *supra* note 1, at 289 (describing criticism leveled by supporters of affirmative action).

amounts to a betrayal.⁵ Justice Thomas is viewed as the antithesis of, and a most unworthy successor to Justice Thurgood Marshall.⁶

It is understandable why those who favor broad-based, structural remedies for discrimination reject much of Justice Thomas's jurisprudence. Justice Thomas's "originalist" interpretation of the Constitution and libertarian political philosophy lead him to positions that break with those favored by liberal advocates of racial justice at almost every turn.⁷ This is true across a wide variety of Justice Thomas's decisions, including opinions in voting rights, criminal law, and affirmative action cases.

Like many others, I find much in Justice Thomas's judicial record troubling. As one example, his concurring opinion in *Missouri v. Jenkins*,⁹ the 1995 school desegregation case, strikes me as deeply flawed. In *Jenkins*, Justice Thomas concluded that even voluntary transfers by white students to magnet schools in central cities were beyond the scope of a proper remedial order, despite a history of de jure segregation and persistent de facto segregation in the central city schools.¹⁰ Justice Thomas's decision was driven by his rejection of what he viewed as the post-*Brown v. Board of Education*¹¹ orthodoxy, which postulates that, "if integration . . . is the only way that blacks can receive a proper education, then there must be something inferior about

⁵ See BENJAMIN HOOKS, THE MARCH FOR CIVIL RIGHTS: THE BENJAMIN HOOKS STORY 297 (2004) (stating that "Clarence Thomas's fast rise was a result of affirmative action").

⁶ The NAACP opposed the Thomas nomination. See HOOKS, *supra* note 5, at 297-309 (describing discussions of Thomas's nomination within the NAACP and Thomas's attempts to influence the Association's vote). Other prominent black groups, including the Congressional Black Caucus and the National Bar Association ("NBA"), were indecisive about the Thomas nomination. The NBA's judicial selection committee voted against Thomas, 6 to 5, and its board of governors then voted in favor of Thomas, 23 to 21. The NBA convention ultimately rejected his nomination by a vote of 128 to 124. See THOMAS, *supra* note 1, at 358-59. But many civil rights groups supported or expressed no opinion about Thomas's nomination to the Supreme Court because of his race, despite misgivings about his positions on issues such as affirmative action. This was because they presumed that the Bush administration would only nominate conservatives, and they preferred a black conservative to a white one. See THOMAS, *supra* note 1, at 351, 357-59 (discussing preference for black rather than white conservatives). According to polls, a majority of blacks supported Thomas's nomination, despite disagreement with many of his views. See FOSKETT, *supra* note 1, at 289 (noting perception that Thomas was unsympathetic to problems faced by African Americans); THOMAS, *supra* note 1, at 352, 359 (basing support on various theories).

⁷ See THOMAS, *supra* note 1, at 500-01 (describing the growing schism between Thomas's opinions and that of liberal proponents of racial justice). By racial justice, I mean equal opportunity and substantive equality for people of color.

⁸ See FOSKETT, *supra* note 1, at 71-72, 288-89, 298, 314, 318 (describing Thomas's libertarian political philosophy and his renown as the most conservative Justice).

⁹ 515 U.S. 70, 114-39 (1995) (Thomas, J., concurring).

¹⁰ See *id.* at 117-18 (arguing that voluntary desegregation is beyond the scope of the remedy).

¹¹ 347 U.S. 483 (1954).

blacks."¹² According to Justice Thomas, this erroneous assumption stigmatizes African American individuals and institutions and is unsupported by sufficient evidence demonstrating the utility of interracial contact to black students.¹³ That federal judges have issued "extraordinary" and exorbitantly expensive structural injunctions mandating school integration is, then, a misguided abuse of power, according to Thomas.¹⁴

In some respects, Justice Thomas's focus on stigmatic injury and his repudiation of the assumption of black inferiority are compelling, as I will discuss below. But he plainly overstates his case in *Jenkins*. The right to equal educational opportunity articulated in *Brown*¹⁵ and subsequent cases¹⁶ cuts against Justice Thomas's conclusion that even voluntary, cross district desegregation is unlawful. Similarly, his categorical claim that desegregation is an ineffective remedy for educational inequality¹⁷ is overstated. The structural injunctions put in place in many school districts during the late 1960s and early 1970s, after years of resistance to *Brown*, have desegregated some school systems, including through voluntary transfer programs.¹⁸ Many studies demonstrate that interracial contact made possible by virtue of the injunctions that Justice Thomas excoriates have enhanced the educational and life opportunities of many African American students.¹⁹ In his zeal for protecting students of color from stigmatic harms and endorsing majority black schools, Justice Thomas overlooks the fact

¹² *Jenkins*, 515 U.S. at 114, 120–22.

¹³ *Id.* at 120–23, n.2 ("[T]here simply is no conclusive evidence that desegregation either has sparked a permanent jump in the achievement scores of black children, or has remedied any psychological feelings of inferiority black schoolchildren might have had.").

¹⁴ *See id.* at 124–26 ("Judges have directed or managed the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations or their authority.").

¹⁵ 347 U.S. at 493 (holding that the segregation of schoolchildren solely on the basis of race is inherently unequal).

¹⁶ *See Freeman v. Pitts*, 503 U.S. 467, 491 (1992) (requiring an effective effort to desegregate before a federal court can partially end supervision of a school district formerly segregated by law); *Hills v. Gautreaux*, 425 U.S. 284 (1976) (ordering metropolitan remedy for public housing discrimination in city); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (ordering busing to alter school race populations).

¹⁷ *See Jenkins*, 515 U.S. at 132 (discussing an ineffective school desegregation decree).

¹⁸ The success of some plans lasted for a limited period of time due to white flight and other demographic changes. *See James E. Ryan, Schools, Race, and Money*, 109 YALE L.J. 249, 297–307 (1999) (surveying social science studies documenting shorter- and longer-term benefits of racial and socioeconomic integration for poor minority students in numerous school districts across the country); *see also GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 65–67, 105–06, 130 (1996) (examining short- and long-term effects of integration based on test scores and other benchmarks).

¹⁹ *See ORFIELD, supra* note 18, at 65–67, 105–06, 130 (discussing relationship between desegregation and improved life chances).

that many African American students flourish in integrated settings.²⁰ I can think of no convincing justification—legal, practical, or political—for denying such students the possibility of integrated education, particularly when the contact is initiated by whites and occurs on a voluntary basis. *Jenkins* and like decisions have eviscerated *Brown* by undermining precedent that sanctions expansive remedies for far-reaching harms.²¹

Notwithstanding my disagreement with the views that Justice Thomas expresses in *Jenkins* and other cases, I think it would be wrong to assume, as others seem to have done, that Justice Thomas lacks genuine concern about racial equality. Justice Thomas has repeatedly discussed his experiences of discrimination and expressed concern about the stigma that flows from racial bias.²² Thomas's recent public addresses make it abundantly clear that he is aware of the debilitating effects of racial discrimination.²³ Another clue to the depth of his passions on the subject was revealed during oral argument in *Virginia v. Black*, a case before the Court during the 2003 term, involving the constitutionality under the First Amendment of a statute making cross burning on another's property a felony.²⁴ Breaking his customary silence at oral argument, Justice Thomas informed his colleagues and counsel that cross burning was "unlike any symbol in our society," intended to "cause fear," and to "terrorize" blacks and other minorities.²⁵ Justice Thomas's statement was widely viewed as

²⁰ See *id.* (citing gains in test scores and life opportunities of African American students in integrated schools).

²¹ See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979) (establishing a rebuttable presumption that present racial imbalance was proximately caused by prior intentional, de jure discrimination); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 211–12 (1973) (discussing how a city-wide desegregation plan based on segregation in one area affected patterns throughout the city); *Swann*, 402 U.S. at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

²² See, e.g., *FOSKETT*, *supra* note 1, at 60–66 (describing Thomas's early childhood experiences in the segregated South); *THOMAS*, *supra* note 1, at 500–02 (describing Thomas's press conferences with black journalists and a speech to Tuskegee University students emphasizing details of his background).

²³ See *FOSKETT*, *supra* note 1, at 7, 60–66, 71–72, 292 (describing Thomas's early experiences with racial stratification by skin color and feelings of racial inferiority in the segregated South); *THOMAS*, *supra* note 1, at 3–4, 320, 357, 400, 500–02 (describing the controversy surrounding Thomas's confirmation and his own assessment that the experience was one of the most troubling forms of discrimination he had ever experienced). Justice Thomas has sometimes shared his experiences in what would seem to be self-serving ways, most obviously during his confirmation hearing, after allegations of sexual harassment by Anita Hill, a former employee. See *THOMAS*, *supra* note 1, at 4, 368 (noting Justice Thomas's statements describing his life in poverty and segregation in Georgia and his claim that he was being subjected to a "high-tech lynching").

²⁴ 538 U.S. 343 (2003).

²⁵ Transcript of Oral Argument at the U.S. Supreme Court at 23–24, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107).

"shift[ing] the balance" in the Court's 6-3 decision to uphold the constitutionality of the statute.²⁶

In addition, Justice Thomas demonstrated his concern about the inadequate educational opportunities available to low-income, African American students in *Zelman v. Simmons-Harris*, the 2002 school voucher case.²⁷ In *Zelman*, the Court upheld Cleveland's pilot voucher program against an Establishment Clause challenge, despite religiously-affiliated schools' disproportionate participation in the program.²⁸ Noting that "failing urban public schools disproportionately affect minority children,"²⁹ Justice Thomas rejected the logic of those who oppose voucher programs including religious schools based on "formalistic concerns about the Establishment Clause" and a "romanticized ideal of universal public education."³⁰ "Most black people have faced too many grim, concrete problems to be romantics," Thomas noted.³¹ In light of the cold realities that poor blacks face in failing public schools and the "core purposes of the Fourteenth Amendment,"³² Thomas found Cleveland's voucher experiment lawful.

As his decisions in *Zelman* and *Jenkins* demonstrate, Justice Thomas's objections to the agenda favored by liberal civil rights groups seem to turn on remedial considerations rather than on indifference to bias. He categorically rejects race-conscious remedies. Thus, Justice Thomas's support for the Cleveland voucher program that primarily benefited poor, minority children turned, in part, on the fact that the program was not explicitly race conscious. But he has questioned explicitly race-conscious remedies in school desegregation and affirmative action cases because, as he sees it, they are premised on an assumption of black deficiency, and therefore perpetuate the very stigma that they are designed to remediate.³³ Justice Thomas's opin-

²⁶ *Black*, 538 U.S. at 358-60; see Paul Butler, *For Two Justices, Past is Prologue*, LEGAL TIMES, June 30, 2003, at 60.

²⁷ 536 U.S. 639, 644-53 (2002) (rejecting establishment clause challenge to school voucher program despite the fact that ninety-six percent of participants attend religiously-affiliated schools on grounds that program did not advance or inhibit religion.)

²⁸ *Id.*

²⁹ *Id.* at 681 (Thomas, J., concurring).

³⁰ *Id.* at 682.

³¹ *Id.* (quoting THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES 228 (1972)).

³² *Id.*

³³ See FOSKETT, *supra* note 1, at 72, 292 (noting Thomas's insistence on interpreting laws strictly to avoid double standards prevalent in the segregated South during his childhood); see also *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (claiming that the stigma associated with affirmative action tags all blacks as undeserving notwithstanding qualifications); *Missouri v. Jenkins*, 515 U.S. 70, 119-22 (1995) (noting studies stating that test score gap between blacks and whites has narrowed as a result of gains in socioeconomic status rather than desegregation); *United States v. Fordice*, 505 U.S. 717, 745 (1992) (noting that the elimination of all racial imbalance is not required by the Constitution).

ions about how best to remedy racial inequality in education certainly are subject to debate. But his disagreement with conventional, liberal perspectives on the best remedies for racial discrimination does not mean that he is unconcerned about the welfare of African Americans.

Some commentators are dismissive of Justice Thomas's claim that affirmative action tarnishes the achievements of all minorities.³⁴ Justice Thomas may well be guilty of becoming fixated on the concept of racial stigma,³⁵ perhaps based on his own scarring experiences,³⁶ and of mischaracterizing the role that racial stigma plays in the lives of most minorities. There is little reason to believe that most affirmative action beneficiaries experience the programs as stigmatizing. But there also is little reason to believe that the stigma of racist stereotypes is unreal or an examination of it unwarranted within constitutional jurisprudence. In fact, the dignitary harm flowing from racial discrimination and stereotypes is generating renewed scholarly interest.³⁷ One recent commentator has characterized stigma as the "true source of racial injury in the United States," historically and contemporarily.³⁸ Thus, Justice Thomas's focus on stigma may well speak to new impulses in antidiscrimination scholarship and advocacy in the post-civil rights era.

The heated rhetoric that surrounds Justice Thomas can obfuscate the depth of his engagement with the issue of racial inequality. Justice Thomas's race jurisprudence should be considered on its own terms, if for no other reason than the fact that he can be expected to

³⁴ See Butler, *supra* note 26, at 59 (arguing that affirmative action is not stigmatizing).

³⁵ See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 245-48 (1998) (finding that affirmative action beneficiaries tend to support race-sensitive programs and support further emphasis on such policies).

³⁶ See FOSKETT, *supra* note 1, at 60, 80-81, 135 (describing Justice Thomas's appearance and his experiences in high school and law school); THOMAS, *supra* note 1, at 136, 140-43 (describing Thomas's law school experience).

³⁷ See, e.g., GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 59-61 (2002) (suggesting that stigma from racism lends insight to contemporary problems affecting blacks in America); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669 (2005) (arguing that dignity and racial justice are linked and that *Lawrence v. Texas*, 539 U.S. 558 (2003) affirmed the dignity of gays); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (arguing that racial stigma is the main source of racial harm and proposing a four-part test for determining whether an act or policy poses a risk of stigmatic harm); Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL., 797-811 (1995) (noting that minorities under perform on standardized tests specifically when reminded of a stereotype regarding their groups' abilities before test taking).

³⁸ See Lenhardt, *supra* note 37, at 809. For a somewhat different discussion of how stigma relates to African American experience, which focuses on the black middle class, see Tomiko Brown-Nagin, *An Historical Note on the Soundness of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991 (2004) (discussing how black elites in twentieth-century Atlanta developed flourishing socioeconomic structure within racially separate social and economic spaces).

sit on the Court for at least another generation. Justice Thomas's ideas unquestionably will help to shape the future of race relations in this country. His emphasis on stigmatic racial harm may present new opportunities for blacks and other minorities to seek equality through the courts. For this reason, Justice Thomas's most recent statements on race and educational opportunity, found in the University of Michigan affirmative action cases, are crucial considerations as we ponder the Court's future race jurisprudence.

Here, I consider Justice Thomas's dissenting and concurring opinion in *Grutter v. Bollinger*³⁹ and reach an unexpected conclusion. On the face of it, Justice O'Connor's majority opinion deserves the greatest attention. By her swing vote, Justice O'Connor gave liberal civil rights advocates a victory, snatched from the jaws of defeat.⁴⁰ By contrast, Justice Thomas's dissenting opinion, finding the University of Michigan Law School's affirmative action policies unconstitutional, continued his antagonistic relationship with liberal civil rights advocates.⁴¹ However, a closer inspection of the two opinions reveals a more complex reality. In some respects, Justice Thomas's discussion of affirmative action has more depth and breadth than the utilitarian justification for race-conscious policies offered by the University and embraced in the majority opinion. Justice Thomas offers a racial critique of law school admissions criteria and opens the door to an argument that universities' knowing reliance on criteria that systematically favor whites should be understood as a form of discrimination that is cognizable and remediable at law. In this way, Justice Thomas expresses a "transformative" politics on the issue of access to elite law school education.⁴²

Professor Charles Lawrence advocates a "transformative," or structural, approach to the systemic problem of racial disadvantage in a recent article critiquing the University of Michigan's defense of its affirmative action policies.⁴³ This approach would emphasize the ways in which traditional admissions criteria compound the educational disadvantages to which blacks and other minorities are subjected in lower school education and would recognize universities' moral re-

³⁹ 539 U.S. 306 (2003).

⁴⁰ See Lynette Clemtson, *NAACP Legal Defense Fund Chief Retires*, N.Y. TIMES, Jan. 16, 2004, at A10 (noting the Director Counsel's willingness to retire after the Supreme Court's decision upholding affirmative action in *Grutter v. Bollinger*); David Savage, *Court Affirms Use of Race in University Admissions*, L.A. TIMES, June 24, 2003, at 1 (noting that for the first time in recent history, civil rights leaders celebrated a major victory).

⁴¹ For this view, see Butler, *supra* note 26, at 59.

⁴² See Charles Lawrence, *Two Views of the River, A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 940 (2001) (characterizing the diversity defense as conservative and perpetuating the status quo).

⁴³ *Id.* at 963.

sponsibility to correct for this systemic inequality.⁴⁴ In its own way, Justice Thomas's opinion aligns with Lawrence's call for a transformative approach to the issue of racial discrimination in higher education. Justice Thomas's rhetoric is significant.⁴⁵ It represents a rare instance in which a Justice has explicitly and affirmatively rejected the deficit modality of reasoning about minorities' right to equality in education.⁴⁶

Whether Justice Thomas's rhetoric can be deployed to articulate antidiscrimination rights and remedies that he and other members of the Court would embrace is, however, an entirely different and open question. I will return to this question in the concluding section of this Essay.

I. THE LIBERAL POSITION

The University of Michigan advanced a mainstream liberal justification for affirmative action in the *Grutter* and *Gratz* litigation.⁴⁷ The University set forth its case in two steps. First, it argued that enrolling a diverse student body was central to its educational mission. According to the University, a diverse student body served the utilitarian purpose of preparing students for the global workplace and a multicultural society.⁴⁸ Second, the University argued that a diverse student body cannot be achieved without race-conscious measures. Why? For the simple reason that minorities underperform, as compared to whites on the criteria that the university uses in making admissions decisions. Given the credentials gap, affirmative action was essential for achieving racial diversity in selective institutions of higher education.⁴⁹ More specifically, the Law School argued that it "must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if the admissions decisions were based primarily on undergraduate GPAs and LSATs."⁵⁰ Having

⁴⁴ *Id.* at 943–46, 954 (noting that the reliance on high school GPAs benefits wealthier, non-minority school districts which are able to offer advanced placement courses and that SAT scores operate in an exclusionary fashion).

⁴⁵ See *infra* notes 118–23 and accompanying text.

⁴⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954), is the paradigmatic case of the deficit approach. See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, J. AM. HIST., June 2004, at 92–118.

⁴⁷ See Lawrence, *supra* note 42, at 962–64 (describing the University administration's dilemma in deciding to argue a mainstream liberal approach or a transformative approach).

⁴⁸ See Brief for Respondents Kimberly James, et al. at 24–25, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief for Respondent James] (arguing that a diverse student body is necessary to fulfill the objective of *Brown* and reduce stigma and discrimination).

⁴⁹ See *id.* at 35–36 (arguing that the LSAT is not a color blind or nondiscriminatory standard of equality).

⁵⁰ See *Grutter*, 539 U.S. at 318 (quoting Erica Munzel, the University of Michigan's Director of Admissions). The test score gap is the more problematic of the two measures. See William Kid-

framed the problem in this way, the University avoided discussing the question of whether altering its admissions criteria would enable it to steer clear of race-conscious measures. Instead, it defended its race-conscious policy as lawful under *Regents of the University of California v. Bakke*⁵¹ because race was not the predominant factor in admissions decisions.⁵² The University's policies were of the competitive, race-plus variety that Justice Powell had endorsed in *Bakke*,⁵³ rather than per se unconstitutional racial quotas.⁵⁴

The University largely ceded the matter of discrimination to the plaintiffs.⁵⁵ The plaintiffs' claims of discrimination were predicated on the fact that whites, as a group, outperform minorities, as a group, in the relevant admissions criteria.⁵⁶ As noted above, the University did not (and could not) dispute the contention that its admissions criteria systematically favor white applicants—upper-income-level white applicants, in particular.⁵⁷ Consequently, the battle over affirmative action in *Grutter* and *Gratz* was fought as a competition between higher-scoring whites and lower-scoring minorities.

Framed in these terms, the white plaintiffs were able to claim a moral high ground. Affirmative action could be presented as an unfair racial spoils system in which minorities are rewarded despite academic deficiencies. This seemed especially so within the context of the *Grutter* and *Gratz* cases because the University of Michigan declined to justify affirmative action programs as remedies for discrimi-

der, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment*, 89 CAL. L. REV. 1055, 1095–1100 (2001) (arguing that heavy reliance on standardized tests penalizes minority law school applicants); Susan Sturm & Lani Guinier, *Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 974, n.85 (1996) (concluding that high school grades are more predictive of college freshman-year grades than SAT results).

⁵¹ 438 U.S. 265, 320 (1978) (“[T]he state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”); *id.* at 314 (“[T]he interest of diversity is compelling in the context of a university’s admissions program.”).

⁵² The plaintiffs’ expert conceded this point. *Grutter*, 539 U.S. at 320.

⁵³ 438 U.S. at 317–18 (finding Harvard’s program of using race as one factor among many considered in making admissions decisions lawful).

⁵⁴ *Id.* at 272–75 (finding program that set aside sixteen of one hundred seats in each year’s entering class for minorities and that funneled minorities through a separate admissions process unlawful).

⁵⁵ See Brief for Respondent James, *supra* note 48, at 21–25 (disavowing remedial justification for affirmative action but acknowledging persistent racial stratification).

⁵⁶ See *Grutter*, 539 U.S. at 316–20 (citing testimony during the bench trial by numerous deans and faculty regarding academic performance by whites and minorities).

⁵⁷ There is a correlation between race, wealth, and higher scores on the LSAT. See Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 141–49 (2003) (drawing a parallel between economic mobility and academic performance); Kidder, *supra* note 50, at 1062–85 (describing the adverse impact of standardized testing on minority law school applications); Sturm & Guinier, *supra* note 50, at 968–69, 982–97 (arguing that wealth strongly correlates with SAT and LSAT performance).

nation.⁵⁸ Instead, the University grounded its defense in the language of today's political economy, "diversity."⁵⁹ However, as the following section describes, other parties to the litigation sought to disrupt this utilitarian frame of reference by raising the problem of past and present racial stratification as the defining issue in the cases.

II. THE INTERVENORS' CHALLENGE

The *Grutter* litigation featured a coalition of student-intervenors that attempted to shift the terms of the debate in the case. The Coalition to Defend Affirmative Action and Integration, and Fight for Equality By Any Means Necessary ("BAMN") led the intervention.⁶⁰

BAMN challenged the University's justification for affirmative action, and therefore, the plaintiffs' presumption of moral superiority in the debate over minority racial preferences.⁶¹ The intervenors' defense of affirmative action programs struck at the heart of the plaintiffs' claims of entitlement to admission to the University. The *Grutter*

⁵⁸ The University of Michigan has no history of discrimination against African Americans in admissions. See GREG STOHR, A BLACK AND WHITE CASE: HOW AFFIRMATIVE ACTION SURVIVED ITS GREATEST CHALLENGE 19–23 (2004) (describing the University of Michigan's admissions policies). However, there were allegations and evidence that the University had engaged in racially discriminatory and exclusionary practices against blacks and other minorities who had attended the University over time. For example, intervenors placed evidence in the record showing the existence of segregated on-campus housing, organizations, and activities, and a racially hostile climate on campus perpetrated by white professors, students, and staff, all sanctioned by the University through acts of commission or omission. In addition, the intervenors claimed that the University's admissions criteria are discriminatory. See Brief for Respondent James, *supra* note 48, at 3–5 (describing bias in the University's admissions procedures since the 1950s); Brief of Respondent Ebony Patterson, et al. at 3, 5–17, 25–29, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (same).

⁵⁹ For critiques of diversity as a basis for defending affirmative action, see Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1616–20 (2003) (critiquing Justice O'Connor's justification of affirmative action); Lawrence, *supra* note 42, at 964–74 (contending that the "diversity defense" of affirmative action is too conservative a defense in light of the racial inequality of secondary educational institutions); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 941–47 (1997) (arguing that addressing race-based inequality would more effectively achieve diversity than affirmative action).

⁶⁰ BAMN is a protest-oriented group that links itself to the social movements of the 1960s. It aims to complete the unfinished agenda of the mid-twentieth-century civil rights struggle. See BAMN, *Liberator Declaration*, LIBERATOR: JOURNAL OF THE EMERGING NEW CIVIL RIGHTS MOVEMENT, Sept. 2001, at 2 ("We declare our intention to defend affirmative action, integration and all the gains of the previous Civil Rights Movement."), available at <http://www.bamn.com/liberator/liberator-5.pdf>.

⁶¹ The intervenors consisted of a coalition of several student groups, including Students Supporting Affirmative Action ("SSAA"), United for Equality and Affirmative Action ("UEAA"), Law Students for Affirmative Action ("LSAA"), and the Coalition to Defend Affirmative Action and Integration, and Fight for Equality by Any Means Necessary ("BAMN"). For a description of this coalition, see Miranda Massie, *Representing the Student Intervenors in Grutter*, JURIST, Sept. 5, 2003, at <http://jurist.law.pitt.edu/forum/symposium-aa/massie.php>.

intervenors recasted the debate over the constitutionality of affirmative action in terms that focused squarely on discrimination against minorities, an issue that the plaintiffs altogether avoided and the University minimized. The intervenors' defense pointed to the racial, class, and gender bias that universities knowingly perpetuate by relying so heavily on putatively "standardized" tests of ability in admissions decisions.⁶² They argued that these criteria necessitate race-conscious admissions policies, *not* the academic deficiencies of beneficiaries.⁶³ In other words, they argued that affirmative action addresses the dysfunctional structure of access to higher education. The intervenors sought to turn both the plaintiffs' case and the University's defense on their heads.

More specifically, BAMN argued that high-stakes tests and other discriminatory admissions criteria are linchpins of the caste-like structure of the American socioeconomic system. According to the intervenors, these criteria funnel blacks and Hispanics into inferior schools at all levels, including K-12 education, college, and law school, and restrict these groups primarily to lower-paying, lower-skilled jobs.⁶⁴ Thus, the very premise of the plaintiffs' case—that whites with better qualifications faced discrimination by virtue of affirmative action programs benefiting minorities—was false.⁶⁵ It is perverse, they asserted, to claim that the "problem" that race-conscious admissions practices address is the limited academic ability of minorities.⁶⁶ For the relevant admission measures do a poor job of predicting future academic or job performance of many students, including African Americans, Hispanics, Native Americans, certain Asian groups, women, and students from working class or poor backgrounds.⁶⁷ They are most useful for efficient processing of applica-

⁶² See Brief for Respondent James, *supra* note 48, at 3-6, 38-49 (describing discriminatory effects of heavy use of standardized tests in law school admissions).

⁶³ *Id.*

⁶⁴ See Greg Winter, *The Supreme Court: The Demonstrators; Thousands of Students Gather Outside Court in Support of Admission Policies*, N.Y. TIMES, Apr. 2, 2003, at A14 (attributing student demonstrations in support of affirmative action to the belief that the Court's decision would have a direct impact on their lives). See generally Brief for Respondent James, *supra* note 48, at 33-37 (arguing that an end to affirmative action would lead to the immediate resegregation of law schools and subsequently, the profession itself).

⁶⁵ See Brief for Respondent James, *supra* note 48, at 18-20 (arguing that the plaintiffs' case relies on the false notion that the LSAT is non-discriminatory).

⁶⁶ See *id.* at 22-23 (arguing that race-conscious admissions seek to eliminate the racial bias of the LSAT and admissions criteria).

⁶⁷ See Guinier *supra* note 57, at 137-51 (describing the inconsistency between admissions criteria and student performance); Kidder, *supra* note 50, at 1062-85 (finding that standardized testing has an adverse impact in admission of similarly qualified minorities); Sturm & Guinier, *supra* note 50, at 982-97 (finding a strong correlation between wealth and standardized test performance). But see Kidder, *supra* note 50, at 1089-94 (describing study results indicating that the LSAT over predicts law school performance by African Americans and Latinos).

tions and for predicting the performance of wealthy whites, males in particular.⁶⁸ Even the designers of the test concede that its measures are imperfect predictors of ability and are misused when applied to groups for whom they are poor predictors of ability, the intervenors noted.⁶⁹

The same groups for whom the predictive value of standardized tests is inadequate are typically beneficiaries of affirmative action policies, including those of the University of Michigan.⁷⁰ Thus, for BAMN, these policies are necessary to offset the bias that universities knowingly perpetuate and entrench by relying on flawed criteria in making admissions decisions.⁷¹ Affirmative action in admissions is, then, a form of distributive and corrective justice.⁷² It promotes the integrative ideal established in *Brown v. Board of Education*, a more egalitarian educational structure, and thus a more egalitarian democracy.⁷³

III. THE *GRUTTER* MAJORITY OPINION

The *Grutter* majority opinion demonstrated that the intervenors' perspective was a distant consideration. None of the Justices who

⁶⁸ See Kidder, *supra* note 50, at 1080–1109 (detailing a study showing that the LSAT is a better predictor of white male performance than minorities).

⁶⁹ See Brief of Amicus Curiae National Center for Fair and Open Testing at 10, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (quoting from a report by the Law School Admission Council cautioning that test misuse and over reliance on LSAT scores flow from law schools' obsession with classroom diversity and ranking by the *U.S. News & World Report*).

⁷⁰ Michigan's definition of underrepresented minorities was limited to African Americans, Hispanics, and Native Americans. See *Grutter v. Bollinger* 539 U.S. 306, 316 (2003).

⁷¹ See Transcript of Argument by Miranda Massie at 71, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Massie Transcript] (arguing that "[there is] a systematic double standard that operates to favor white people . . . [a]nd affirmative action operates to offset that double standard"); BAMN, *Why and How We Must Defend Affirmative Action*, LIBERATOR, Nov. 1997, at 1 (noting BAMN's stance that affirmative action was implemented to offset social inequality), available at <http://www.bamn.com/liberator/liberator-1.pdf>.

⁷² See Brief for Respondent James, *supra* note 48, at 41 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978)) (discussing Justice Powell's observation that a showing of bias in entry credentials could be a valid basis for upholding race-conscious admissions). Some scholars have noted the tension between corrective and distributive justice. See Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992) (contrasting and discussing the relationship between corrective and distributive justice). However, constitutional scholars who have written about structural injunctions in education, such as school desegregation decrees, have understood these decrees in terms of corrective justice, despite its inexact fit. See, e.g., Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986) (discussing the corrective approach of the law to remediate effects of past discrimination).

⁷³ See Massie Transcript, *supra* note 71, at 67–70 (defining the basic question in the case as whether black students who suffered in integrating schools in wake of *Brown* would have suffered "in vain"); STOHR, *supra* note 58, at 164 (citing Massie's argument equating allowing affirmative action with taking a step toward equality, justice, and democracy).

supported race-conscious admissions policies engaged the intervenors' discrimination claim. Instead, the majority opinion was framed in terms of the viability and legitimacy of our socioeconomic structure. Rather than reasoning about this theme with minorities at the center of analysis, however, the majority opinion concerned itself primarily with utilitarian concerns. The decision principally justified diversity-based affirmative action in higher education as an engine for advancing national security,⁷⁴ the domestic and global economy,⁷⁵ and legitimizing the political and legal structures.⁷⁶

The Court disregarded the intervenors' credentials bias argument, though it was undisputed by the plaintiffs and the University. In doing so, the majority rejected the intervenors' attempt to cast race-sensitive admissions as a remedy for the University's use of discriminatory admissions criteria.⁷⁷ Justice O'Connor expressed deference to the Law School's judgment about how best to assemble student bodies with a critical mass of minority students.⁷⁸ Requiring the University of Michigan to reconfigure its admissions criteria would be a "drastic" remedy, she stated.⁷⁹ The majority's rhetoric went beyond expressions of deference to the University's expertise. The opinion also revealed the majority's faith that the University's admissions criteria measure ability or aptitude. Justice O'Connor noted that the Law School's use of race neutral alternatives to the criteria then in place at Michigan would mean "a dramatic sacrifice of . . . the academic quality of all students."⁸⁰ The majority did not otherwise respond to the structural critique of selective higher education that the intervenors posited. Strikingly, it was Justice Thomas who engaged this issue in his opinion.

IV. JUSTICE THOMAS'S OPINION

Rather than situating his analysis around the facts as presented by the plaintiffs and the University, both of which depicted minority students as academically deficient,⁸¹ Justice Thomas's opinion discussed

⁷⁴ *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (asserting that a racially diverse officer corps is essential to the military's function of providing national security).

⁷⁵ *Id.* at 307-08, 330-33 (discussing the needs of businesses in terms of skills developed through exposure to diverse cultures and people as well as the interest in opening the path to leadership to qualified individuals).

⁷⁶ *Id.* at 330-33 (explaining that education is the foundation of good citizenship which entails participation in civic life on every level including as the nation's leaders).

⁷⁷ See *infra* notes 84-85 and accompanying text.

⁷⁸ *Grutter*, 539 U.S. at 340 (deferring to the school's judgment that critical mass cannot be achieved through race-neutral means without abandoning selectivity).

⁷⁹ *Id.* at 340.

⁸⁰ *Id.*

⁸¹ See *supra* notes 49-50, 55-57 and accompanying text.

the structural factors that animate the push for affirmative action. This is the context that the plaintiffs and defendant avoided, and that the BAMN intervenors insisted was integral to a full and fair assessment of the constitutionality of the Law School's affirmative action programs. As we know, Justice Thomas disagreed with the intervenors' argument that affirmative action is an appropriate remedial response to systemic bias in admissions. But Justice Thomas, alone among the Justices, recognized the limitations inherent in the University's vision of equal protection.

According to Justice Thomas, the University of Michigan Law School's "need" to use race-conscious criteria to attain a diverse student body was a "self-inflicted wound."⁸² This is the major theme of Justice Thomas's opinion challenging the University's claim that it is unable to maintain its deep commitment to a racially diverse student body without resort to affirmative action. The University argued that it should not have to abandon "selectivity" as a "core part of its educational mission" in its quest to achieve racially diverse learning environments.⁸³ Justice Thomas seized upon what he viewed as the twisted nature of the University's argument: the choice between "selectivity" and "diversity" was one of its own making. But for the University's heavy reliance upon discriminatory admissions criteria as a sorting mechanism, the aspirations for diversity and selectivity would not be in tension. The precise language of Justice Thomas's critique of the Law School's argument is worth noting at length. He wrote:

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to "correct" for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. . . . Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other *allegedly* merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking.⁸⁴

In Justice Thomas's view, the practice of affirmative action hides the real problem surrounding access to higher education: the admissions

⁸² *Grutter*, 539 U.S. at 350.

⁸³ *Id.* at 340.

⁸⁴ *Id.* at 369–70 (emphasis added).

system is fundamentally flawed. It is racially discriminatory due in part, he suggested, to universities' lack of will and imagination regarding race-neutral means of selecting student bodies. The University's "standards" constitute a willfully "exclusionary admissions system."⁸⁵

Justice Thomas argued that, if necessary, the entrenched system of selective higher education should give way to broader access to legal education.⁸⁶ According to Justice Thomas, should selective law schools continue to insist that there is a tension between selectivity and diversity, and that minorities' underperformance on admissions criteria creates this tension, then selectivity should yield.⁸⁷ "[T]here is nothing ancient, honorable, or constitutionally protected about 'selective' admissions," Justice Thomas claimed.⁸⁸ To the contrary, the history of standardized testing upon which the selective admissions system is based is tied inextricably to the nation's history of discrimination.⁸⁹ Historically, "selective admissions ha[ve] been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators," a way for schools to "select racial winners and losers."⁹⁰ Justice Thomas pointed, in particular, to the use of "intelligence tests" by many of the nation's most prominent universities, including Columbia and Harvard, to discriminate against Jewish applicants during the early twentieth century.⁹¹ The tests were facially neutral; but the discriminatory scheme worked because Jews "scored worse on such tests" than white gentiles, as officials well knew.⁹² Thus, Columbia officials could claim that "[w]e have not eliminated boys because they were Jews," but had "honestly attempted to eliminate the lowest grade of applicant."⁹³ It simply had "turn[ed] out that a good many of the low grade men are New York City Jews."⁹⁴ "[T]he

⁸⁵ *Id.* at 361.

⁸⁶ *See id.* at 368 ("The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race.").

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See infra* notes 90–95 and accompanying text (describing the history of testing methods aimed at discriminating in admissions decisions).

⁹⁰ *Grutter*, 539 U.S. at 369 (Thomas, J., concurring).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (quoting Letter from Herbert E. Hawkes, Dean, Columbia College, to E.B. Wilson (June 16, 1922), *reprinted in* H. WECHSLER, *THE QUALIFIED STUDENT* 160–61 (1977)).

⁹⁴ *Id.* For a discussion of how anti-Semitism and other forms of racism were used during the early twentieth century to "standardize" admissions to law schools and the bar, see JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 24–28, 65–66, 95–121 (1976); *see also* Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475–94 (1997) (same).

tests were adopted with full knowledge of their disparate impact," Justice Thomas concluded.⁹⁵

Given the discriminatory history and effects of these admissions measures and his view that the "entire process is poisoned by numerous exceptions to 'merit,'" such as legacy admissions,⁹⁶ Justice Thomas endorsed a more egalitarian system. "[T]here is much to be said for the view that the use of tests and other measures to 'predict' academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law."⁹⁷ For Justice Thomas, a system in which all applicants who meet "minimum qualifications" are admitted would be preferable to the system currently in place.⁹⁸ Although Justice Thomas professed sympathy for the proponents of affirmative action,⁹⁹ he would not support remedies for racial discrimination that cover up and correct for a law school's decision to rely on an "exclusionary admissions system" known to perpetuate unequal access to schooling.¹⁰⁰ "[T]he Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways," Justice Thomas argued.¹⁰¹

It is here, on the question of remedy, that Justice Thomas parts company with the intervenors, the *Grutter* majority, and liberal civil rights groups. Whereas Justice O'Connor noted that requiring universities to use race-neutral alternatives to affirmative action would be a "drastic remedy,"¹⁰² Justice Thomas took precisely the opposite view. Justice Thomas argued that universities' use of race-conscious measures was the more drastic remedy.¹⁰³ Given Justice Thomas's belief that race consciousness is fundamentally antithetical to the Equal Protection Clause,¹⁰⁴ it is preferable for universities to cease using criteria that systematically disfavor blacks and Hispanics.¹⁰⁵ In Justice Thomas's view, African Americans (and others) are full members of

⁹⁵ *Grutter*, 539 U.S. at 369.

⁹⁶ *Id.* at 367–68.

⁹⁷ *Id.* at 367.

⁹⁸ *Id.* at 361–62.

⁹⁹ *Id.* at 350. ("Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School.").

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 361.

¹⁰² *Id.* at 340.

¹⁰³ See *Grutter*, 539 U.S. at 364–67 (Thomas, J., concurring in part and dissenting in part) (contending that race-conscious remedies may impair the learning potential of African American students).

¹⁰⁴ See *id.* at 368 ("What the Equal Protection Clause does prohibit are classifications made on the basis of race.").

¹⁰⁵ See *id.* at 371 ("[T]he majority still cannot commit to the principle that racial classifications are *per se* harmful.").

the sociopolitical community, on equal footing with whites, rather than special pleaders.¹⁰⁶ As equal stakeholders, minorities and all groups are entitled to an educational structure that facilitates their ability to accumulate socioeconomic capital, rather than one that impedes it.¹⁰⁷ Thus, for Justice Thomas, the discriminatory criteria that Michigan employs are the problem.

Justice Thomas refused to condone race-conscious admissions not only because of his absolute belief in colorblind constitutionalism,¹⁰⁸ but also due to his view that affirmative action causes the separate harm of stigmatizing "beneficiaries."¹⁰⁹ Justice Thomas viewed the University's continued use of racially discriminatory admissions criteria and its use of affirmative action to correct them as proof that the University doubted black applicants' abilities.¹¹⁰ Aligning himself with the sentiments of the abolitionist Frederick Douglass,¹¹¹ Justice Thomas passionately rejected the University's condescension. "Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators."¹¹² Justice Thomas's explicit rejection of the assumption that African Americans are intellectually and socially deficient is a welcomed deviation from the apparent consensus, even among many white liberals, that the racial test gap reflects real racial differences in ability.¹¹³

Whereas the Court's conservatives, especially Justices Thomas and Scalia, are sometimes lumped together without distinction by critics,¹¹⁴ Justice Thomas's advocacy of race-neutral criteria in *Grutter* was, in fact, different from the meritocratic platitudes of Justice Scalia. Justice Scalia uncritically accepted the plaintiffs' simplistic views of merit and their corresponding narrative of entitlement to admis-

¹⁰⁶ *Id.* at 374.

¹⁰⁷ *See id.* at 378.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 371–74 (discussing the stigmatizing effects of race-based classifications on black and Hispanic students).

¹¹⁰ *See id.* at 369–70 ("[L]aw schools continue to use the [LSAT, which they know produces skewed results,] and then attempt to 'correct' for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body.").

¹¹¹ *Id.* at 350 (quoting Douglass's command to "give [the Negro] a chance to stand on his own legs").

¹¹² *Id.*

¹¹³ *See* Kidder, *supra* note 50, at 1080–81 (noting consensus among otherwise sharply divided scholars that racial/ethnic differences in LSAT scores reflect real underlying differences in academic or cognitive skills).

¹¹⁴ *See* THOMAS, *supra* note 1, at 462, 499–50, 565–66 (describing Thomas and Scalia's tandem patterns and Thomas's disagreement with criticism that he is a clone of Scalia). Interestingly, some commentators have also claimed that Justice Marshall was a stooge of another Justice, Justice Brennan. *See* BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 47–48 (1979) (noting that Marshall often followed Brennan's opinions on finer points of law).

sion.¹¹⁵ During oral argument, Justice Scalia responded to the University counsel's defense of race consciousness by instructing the University to, "Just lower your qualification standards. You don't have to be the great college you are. You can be a lesser college if that value [of diversity] is important enough to you."¹¹⁶ Justice Scalia's remark clearly suggested that the University's criteria accurately captured differences in applicants' aptitude.¹¹⁷ Justice Thomas's skepticism that traditional admissions' criteria measure merit sets him decidedly apart from Justice Scalia.

Far from following Justice Scalia's lead, Justice Thomas aligned himself with the most radical voice in the litigation, the *Grutter* intervenors (albeit without explicitly acknowledging them).¹¹⁸ Justice Thomas's stance also mirrored the criticism of the Law School's admissions standards leveled by several of the University's amicus curiae supporters, including the Yale, Harvard, and Stanford Black Law Students' Associations,¹¹⁹ the National Center for Fair and Open Testing,¹²⁰ and the Society of American Law Teachers.¹²¹ Moreover, Justice Thomas's rhetoric resembled elements of the critique that scholars on the political left have made against traditional notions of merit for years.¹²²

¹¹⁵ *Grutter*, 539 U.S. at 346–49. Justices Rehnquist and Kennedy invoked the theme of underserving minority beneficiaries of affirmative action as well. See *id.* at 380–85 (Rehnquist, J., dissenting); *Id.* at 389–92 (Kennedy, J., dissenting).

¹¹⁶ See STOHR, *supra* note 58, at 282 (describing the University of Michigan's admissions policies).

¹¹⁷ See *id.* at 285.

¹¹⁸ Justice Thomas did, however, cite the brief of several Black Law Students' Associations, which questioned heavy reliance on the LSAT. See *Grutter*, 539 U.S. at 370. In the interests of full disclosure, I should note that I was a member of the team of lawyers from Paul, Weiss, Rifkind, Wharton & Garrison who wrote the BLSAs' amicus brief in *Grutter v. Bollinger* in support of the respondent, the University of Michigan School of Law. The team was led by Ted Wells and included David Brown and Melanca Clark. See Brief of Amici Curiae Harvard Black Law Students Ass'n., et. al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um.html.

¹¹⁹ Brief of Harvard BLSA et al. at 27, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

¹²⁰ Brief of the National Center for Fair and Open Testing at 7–25, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

¹²¹ Brief of the Society of American Law Teachers at 16–19, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

¹²² See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 99–110 (1991) (describing the ramifications of the paradigm that "white equals good" and "black equals bad"); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1630–31 (2003) (noting that standardized tests are poor predictors of academic performance and the striking link between test scores and privilege); Guinier, *supra* note 57, at 141–49 (discussing relationship between economic mobility and academic performance); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, *passim* (1991) (discussing discrimination and meritocracy in employment testing); Lawrence, *supra* note 42, at 964–74 (describing the "transformative" approach to systematic racial disadvantage); Roithmayr, *supra* note 94, at 1475–94, nn.84–86 (arguing that merit standards incorporate biases favorable to dominant social groups); Michael

CONCLUSION

Justice Thomas's analytical approach in *Grutter* was concerned about structural inequality in the law school admissions process, perpetuated by the LSAT—a test that is said to be neutral and objective, but which in reality is racially stigmatizing.¹²³ In light of this stigma, Thomas suggested that elite law schools should reassess their decision to privilege efficiency over substantive fairness, and therefore, reconfigure their admissions practices. Thomas's rhetoric eclipsed the liberal defense of affirmative action, which, as Professor Charles Lawrence observes, "buttress[es] the structure of race and class subordination"¹²⁴ and is a "case for the integration of a privileged class."¹²⁵ In his own way, Justice Thomas embraced a more transformative approach to educational access—an approach that, in an important respect, is aligned with the vision of equality that Professor Lawrence advocates.¹²⁶

Justice Thomas's beliefs that the Constitution requires colorblindness and that any and all race-conscious policies breed stigma are subject to debate. But disagreement with Justice Thomas's endpoint should not overshadow the fact that his opinion contains a forceful critique of universities' knowing reliance on admissions criteria that poorly measure the ability of the typical African American and Hispanic, working-class or poor, law school applicant. In this respect Justice Thomas's rhetoric went beyond what the University and the *Grutter* majority offered.

It is, of course, important not to overstate the significance of Justice Thomas's opinion in *Grutter*. It is but one opinion. I do not mean to equate its highly suggestive language with a majority opinion that creates binding jurisprudence regarding race-based admissions. Justice Thomas's rhetoric may mostly reflect his expression of disdain for the white liberal elites and affirmative action policies that he perceives as having tarnished his own hard won educational and career

Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, *passim* (1995) (discussing affirmative action and testing in the employment context); Sturm & Guinier, *supra* note 50, at 971–89 (questioning the reliability of standardized testing as an accurate predictor of academic success). But see DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (defending traditional admissions criteria).

¹²³ *Grutter*, 539 U.S. at 367 ("[T]here is much to be said for the view that the use of tests and other measures to 'predict' academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law.").

¹²⁴ Lawrence, *supra* note 42, at 952.

¹²⁵ *Id.* at 941.

¹²⁶ See *id.* at 964 (arguing that integration of universities and race-conscious admissions policies help to "conquer the scourge of American apartheid").

achievements.¹²⁷ It also is important to note that Justice Thomas's critique overlaps with the transformative vision that Professor Lawrence proposes, but does not constitute a coherent vision of equality. Justice Thomas implied that a frontal assault on the LSAT is plausible, but stopped there. He failed to connect his racial critique of law school admissions criteria to an understanding of the Fourteenth Amendment that would reach and remedy the discrimination that these facially neutral standards perpetuate. That said, Justice Thomas's opinion is certainly provocative, and it would be a mistake to ignore it.

The prospective question is whether, and under what circumstances, Justice Thomas would revisit the issue of structural discrimination in education, and whether his rhetoric can be deployed to articulate rights and remedies that would advance the cause of racial justice. Justice Thomas will be among the Justices who consider what are likely to be new challenges to affirmative action in university admissions in coming years. As Justice Scalia predicts, these challenges will test the meaning of *Grutter's* narrow tailoring prong.¹²⁸ There is every indication that Justice Thomas will vote to interpret *Grutter* to bar most race-conscious admissions policies in higher education. Civil rights lawyers are likely to react to such a development with new legal challenges of their own. A frontal assault on the admissions criteria used by selective universities seems inevitable, despite unfavorable case law.¹²⁹ Justice Thomas's opinion implies that he would seriously entertain such a legal challenge. In fact, his concern about racial stigma might provide a basis for attacking facially race-neutral criteria that, in practice, brands most blacks, other minorities, lower-income applicants, and some women, as academic inferiors. Thomas's approach opens the door to an argument that these stigmatizing criteria should be understood as a form of discrimination that is cognizable and remediable at law.

Assuming Justice Thomas could be convinced that facially neutral criteria are unlawful under the Constitution or federal statutory law, his resistance to race-conscious remedies would remain. For him, the

¹²⁷ See, e.g., FOSKETT, *supra* note 1, at 60–66, 74–83, 118–24, 130–33 (discussing Thomas's perception that he was stigmatized by affirmative action and his shift away from his formerly liberal leanings); THOMAS, *supra* note 1, at 133–38, 140–43, 567–68 (describing Thomas's development of conservative views during law school).

¹²⁸ 539 U.S. at 348–49.

¹²⁹ One such case is the particularly difficult *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there is no private right of action under Title VI). See, e.g., Benjamin Superfine, *At the Intersection of Law and Psychometrics: Explaining the Validity Clause of No Child Left Behind*, 33 J.L. & EDUC. 475 (2004) (discussing the validity of standardized testing from a psychometric and judicial perspective). For a pre-*Sandoval* discussion of such a legal challenge under Title VI of the Civil Rights Act, see Roithmayr, *supra* note 94, at 1496–1501.

bias perpetuated by racially discriminatory admissions criteria would not provide a new and different rationale for race-conscious corrective measures in admissions, as some, including the *Grutter* intervenors, have argued.¹³⁰ Only a race-neutral remedy would satisfy Justice Thomas. Even then, the concerns that he has expressed about structural injunctions in the context of lower school and higher education might limit the scope of such remedies.¹³¹ Hence, even race-neutral remedies would test and potentially stretch Justice Thomas's skepticism about systematic remedies, notwithstanding his potential amenability to an antidiscrimination right against structural racism in university admissions.

Justice Thomas's opinions in *Grutter*, *Jenkins*, and *Zelman* begin a complex conversation in the Court's race jurisprudence about remedies for structural inequality, stigma, and citizenship. His analytical approach raises some pressing questions. How can equal protection doctrine address the harms arising from racial discrimination without perpetuating the harms associated with racial categorization? How can structural remedies, designed to rectify status-based harms, be broad enough to grant class-wide relief, but individuated enough to preserve personal autonomy and dignity? These are critical questions that courts, constitutional scholars, and advocates of racial justice must answer in the post-civil rights era. And so, too, must Justice Thomas.

¹³⁰ See Brief for Respondent James, *supra* note 48, at 2–45 (arguing for race-conscious admissions policies); Roithmayr, *supra* note 94, at 1496–1501 (suggesting practical applications of deconstructive insights when litigating numeric-based law school admission standards).

¹³¹ See *supra* notes 9–14 and accompanying text.